Ponoo v Attorney-General

(2010) SLR 361

Basil HOAREAU for the petitioner
C JAYARAJ for the respondent

Judgment delivered on 16 November 2010

Before Egonda-Ntende CJ, Burhan, Dodin JJ

DODIN J: On 25 February 2010, the petitioner, Jean Frederick Ponoo, was convicted by the Magistrate, Laura Zelia, for the offence of breaking and entering into a building and committing a felony therein, contrary to section 291(a) of the Penal Code of Seychelles. The petitioner was a first offender. On 5 March 2010, the Magistrate sentenced the petitioner to a term of 5 years imprisonment for the said offence in conformity with the provisions of section 27A(1)(c)(i) of the Penal Code as read with section 291(a) of the Penal Code, which providesfor the imposition of a minimum mandatory sentence of 5 years imprisonment for a person convicted of the above-mentioned offence.

The petitioner lodged a petition to the Constitutional Court in terms of rule 3(3) of the Constitutional Court Application, Contravention, Enforcement or Interpretation of the Constitution Rules 1994, praying the Constitutional Court to declare:

(i) that section 27A(1)(c)(i) and section 291(a) of the Penal Code have contravened article 1 and article 119(2) of the Constitution and hence affected the interest of the petitioner:

(ii) that article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and Section 291(a) of the Penal Code;

(iii) that section 27A(1)(c)(i) and section 291(a) of the Penal Code are inconsistent with the provisions of article 1, article 119(2) and article 16 of the Constitution and are hence void; and

(iv) that the sentence of 5 years imprisonment imposed on the petitioner is unconstitutional and void, hence the Constitutional Court should order the immediate release of the petitioner.

The respondent in his capacity as the representative of the Government of Seychelles responded that the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code do not contravene article 1, article 119(2) or article 16 of the Constitution of Seychelles and hence the mandatory minimum sentence of 5 years imprisonment imposed by the Magistrate does not affect the interest of the petitioner. The respondent prayed that the Constitutional Court dismiss the petition with costs for the respondent.

In his submission before this Court, counsel for the petitioner submitted that this petition requires the Constitutional Court to consider and make findings on the following two issues:

Firstly, whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code contravene article 1 and article 119(2) of the Constitution.

Secondly, whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code.

On the first issue, counsel for the petitioner submitted that section 119(2) of the Constitution of Seychelles provides that the judiciary shall be independent and be subject only to the Constitution and other laws of Seychelles and that article 1 of the Constitution of Seychelles states that Seychelles is a sovereign democratic Republic. Counsel argued that article 1 of the Constitution of Seychelles lays down the doctrine of separation of powers which is reinforced by article 119(2) of the Constitution of Seychelles which specifically provides for the independence of the judiciary. Counsel submitted that in view of the provisions of article 1 and article 119(2) of the Constitution of Seychelles, whilst the legislature can provide a range of sentences which can be imposed by the court on a convicted person, the legislature cannot lay down the minimum sentence that can be imposed by a court as such a provision would be an interference with the independence of the judiciary. Counsel relied on the case of *State of Mauritius v Khoryotty*[2006] UKPC 13in support of the contention that article 1 of the Constitution of Seychelles lays down the doctrine of separation of powers as it is worded similarly to article 1 of the Constitution of Mauritius.

Counsel further submitted that the doctrine of separation of powers between the executive, the legislature and the judiciary is an important concept laid down by the Constitution and has to be respected and applied when enacting laws. Counsel submitted that by imposing a minimum mandatory sentence for the offence with which the petitioner was charged and convicted, the independence of the judiciary was violated which also resulted in the violation of the petitioner's constitutional right. Counsel further submitted that the case of *Ali v R* [1992] 2 All ER 1 supports the doctrine of separation of powers and urged the Court to find that the law setting the minimum mandatory sentence which the court must apply to be a violation of that doctrine.

On the second issue, counsel submitted that article 16 of the Constitution provides that every person has a right to be treated with dignity worthy of a human being and not be subjected to torture, cruel, inhuman or degrading treatment. In that context, the indiscriminate mandatory imposition of a minimum mandatory sentence by the provisions of section 27A(1)(C)(i) and section 291(a) of the Penal Code contravened the principle of proportionality in sentencing the petitioner who was a first offender and therefore amounts to cruel and degrading treatment or punishment. Counsel relied on the case of *Phillibert v State of Mauritius* [2007] SCJ 274 in support of his submission on this issue.

Counsel therefore prayed that this Court find in favour of the petitioner on both issues and to declare that the sentence of 5 years imposed on the petitioner is

unconstitutional and order the release of the petitioner from custody.

Principal State Counsel for the respondent made submissions in response to the two issues raised by the petitioner.

On the first issue, Principal State Counsel submitted that the constitutionality of section 27(A)(1)(C)(i) has been raised in previous proceedings before the Constitutional Court and that on each occasion the Constitutional Court has held that these provisions are constitutionally valid. Principal State Counsel further submitted that the legislative prescription of a minimum mandatory sentence does not violate the principles of independence of the judiciary or the separation of powers because classification of crimes and the prescription of sentences to be imposed are legitimate activities of the legislature.

Principal State Counsel further submitted that the case of *State of Mauritius v Khoryatty* does not support the case of the petitioner and is not relevant to the current petition on account of the facts upon which the *Khoryatty* case was based being substantially different to the current case. In the *Khoryatty* case the Court considered the abolition of bail which denied the judiciary its constitutional role of deciding whether or not to grant bail in any given case whilst in this case the issue to be decided is the issue of minimum sentences which does not take away the power of the judiciary to impose sentences but only sets out the range of sentences which the court can impose. Principal State Counsel submitted that setting the range of sentences which a court can impose is the preserve of the legislature and does not take away the independence of the judiciary. Principal State Counsel submitted that the setting of minimum mandatory sentences is well recognized in democratic jurisdictions where it has been determined to be constitutionally valid. Principal State Counsel referred to the cases of *Dodo v State* (2001) 4 LRC 318, *Attorney-General v Dow* [1992] BLR 119, *Dadu v State of Maharashtra* [2000] 8 SCC 437, *Bach Singh v State of Punjab* [1980] 2 SCC 684.Principal State Counsel submitted that in all these cases it was concluded that the legislation imposing minimum sentences for certain categories of offences did not violate the independence of the judiciary.

On the second issue, Principal State Counsel submitted that a minimum sentence of imprisonment is not in itself unconstitutional. Such sentence can only be considered to be unconstitutional by amounting to inhuman or degrading punishment if it is grossly disproportionate to the severity of the offence. The decision as to whether it is grossly disproportionate to the offence must involve a value judgment based on the objective considerations with due regard given to the contemporary norms operating in Seychelles and the consideration of the acceptable norms and values in civilized democratic societies. Principal State Counsel relied on the cases of *Jeffrey Napoleon v Republic* Const Court 1 of 1997, and *Brian Azemia v Republic* Const Court 82 of 1997in support of the submission that the minimum sentence prescribed by section 27A(1)(C)(i) and section 291(a) of the Penal Code are necessary for the achievement of valid social aims and are not grossly disproportionate to the offence the petitioner was convicted of.

Principal State Counsel submitted that in order for the Court to find that the minimum sentence imposed on the petitioner amounts to inhuman or degrading punishment, the Court must find that the sentence imposed and the punishment which will result

is so brutal, inhuman or degrading, and hence so excessive in nature as to outrage the standards of decency of the community. Principal State Counsel submitted that in this case the high incidences of housebreaking offences and its detrimental effect on society required stringent measures in order to curb such practices and the enactment of the relevant legislation was manifestly intended for the promotion of public good and are not in conflict with the Constitution.

Principal State Counsel concluded that since section 291(a) of the Penal Code does not violate the rights of the petitioner under article 16 of the Constitution and does not infringe upon the principle of separation of powers, this petition is vexatious and must be dismissed with costs.
I start the analysis of this petition by making the following observations.

The constitutionality of mandatory sentences raises difficult and sometimes complex questions when considering this important juncture of constitutional law and sentencing. It is not the first occasion that this court has been petitioned to determine whether the legal obligation placed upon it by law to impose a minimum mandatory sentence amounts to a violation of its independence and its constitutional sovereignty as an equal partner in the country's governing structure and also whether a minimum mandatory sentence is a form of cruel and unusual punishment contrary to article 16 of the Constitution. In considering the issue of proportionality in sentencing, the court is also being asked to determine whether the mandatory sentence is grossly disproportionate to what would otherwise be an appropriate and fit sentence imposed at the court's sole discretion. Each time these issues are raised, this court is being further asked to engage in the judicial review of a democratically enacted law. The court's role and its relationship with the legislature are therefore inevitably brought into question.

Inevitably, the court's decision on whether a mandatory sentence is a cruel and unusual punishment would depend on its approaches to both constitutional law and sentencing and the priority it gives to these competing concerns. Be that as it may, minimum mandatory sentences are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as they remove part of the discretion of the judges to make what might be considered reasonable exceptions in appropriate cases. However, such inconsistency gives rise to what is predominantly a conflict of laws and does not necessarily mean that a minimum mandatory sentence per se isnecessarily unconstitutional.

The first issue raised by the petitioner is whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code contravene article 1 and article 119(2) of the Constitution.

Article 1 of the Constitution of Seychelles reads: "Seychelles is a sovereign democratic Republic."

The contention by the petitioner that article 1 lays down the principle of separation of powers among the executive, legislative and judicial arms of government is one that has been well canvassed before this Court. In fact, the respondent admitted the following in paragraph 6of his defence:

> The averments contained in paragraph 4(i) of the Petition are admitted and further answered that the Constitution provides and envisages proper checks and balances amongst the branches of the Government.

It certainly appears to have been the intention of the framers of the Constitution of the Third Republic that the separation of powers was to be the hallmark of this democratic republic. This principle is not a recent phenomenon in political thinking. French scholar, Charles-Louis de Secondat, Baron de La Brécle et de Montesquieu, (1689 to 1755),in his writings titled *The Spirit of Laws,* argued that concentration of power in one person or a group of persons results in tyranny and therefore there was need for decentralization of power to check arbitrariness. To that end he felt the need for vesting the governmental power in three different organs; the legislature, the executive, and the judiciary. This principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle.

Constitutions with a high degree of separation of powers are found worldwide. However despite the promulgation of this principle, the separation of powers amongst the executive, legislative and judiciary has never and maybe will never be absolute, as practical considerations dictate that there must exist certain interdependence and interactions amongst the three arms of government for the checks and balances envisaged by this same principle to function. Today most political systems might not be opting for the strict separation of powers because that is impracticable to apply strictly but implications of this concept can be seen in almost all the countries in some dilutedform. The legislative organ of the State makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public.Thus, even when acting in the ambit of their own powers, overlapping functions tend to appear amongst these organs. It follows therefore that the assertions of the petitioner that article 1 of the Constitution of Seychelles provides for a complete separation of powers to the extent of absolute non-interference by the legislature in the affairs of the judiciary is flawed and misconceived.

Article 119(2) of the Constitution of Seychelles states: “The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles”.

This article lays even greater emphasis on the independence of the judiciary with a caveat however that such independence is subject to the Constitution *and other laws.*

The issue to be decided is whether that principle of independence of the judiciary entails the complete segregation of the judiciary from the executive and legislature in all matters and particularly in sentencing, with specific consideration being given to the imposition of minimum mandatory sentences. In line with my findingsabove in

relation to the principle of separation of powers, practical considerations demand that there must be some interdependence amongst the three arms of government. More telling however, is the qualification inserted into article119(2) qualifying the independence of the judiciary by making that independence subject to the provisions of the Constitution and other laws.

At this point it is worth taking note of articles 46(1) and 46(5)(b) and articles 130(1) and 130(4)(b), which give the Constitutional Court the power to determine the constitutionality and hence the validity of laws enacted by the legislature. It would be tempting therefore to argue, as indeed was the argument of the petitioner, that any law which in effect limits the discretion of the Court in imposing sentences, should be declared unconstitutional and void. Taken at face value, it would appear that there is a contradiction between article 119(2) and articles 46(5)(b) and 130(4)(b) in that on the one hand the Court in its operation is subject to other laws and on the other hand, the Court is empowered to determine whether any law or the provision of any law contravenes the provision of the Constitution. In my opinion this leads to a certain conclusion that the judiciary must be subject to legally enacted laws except where the laws in question are themselves unconstitutional and void. It does not mean however that the requirement to apply a certain range of sentences imposed by legally enacted legislation would be void for infringing the independence of the judiciary or the principle of the separation of powers.

Counsel for the petitioner relied on the cases of *State of Mauritius v Khoryatty* and *Ali v R* in support of his contention that any law which interferes with the discretion of the Court to impose sentence should be declared unconstitutional and void.

In the case of *State of Mauritius v Khoryatty* the Court concluded that the provision of the Dangerous Drugs Act (of Mauritius) denying the right to bail infringed a number of fundamental principles of the Constitution of Mauritius and was consequently void. In my opinion this decision of the Privy Council is correct in so far as the provision in question attempted to remove from the Court completely any possibility of exercising its judicial function in terms of deciding whether or not a person who has not been convicted for any offence should have his right to liberty arbitrarily curtailed. The same cannot be said however, in relation to the imposition of a sentence prescribed by law on a person who has been convicted of an offence. Furthermore, the provision for a mandatory minimum sentence does not remove completely the discretion of the Court to impose a sentence within the range of the minimum up to the maximum.

In the case of *Ali v R* the circumstances were even more remote from the present case. In that case the law provided that the court in which a person would be tried for the offence of drug trafficking was to be selected by the Director of Public Prosecution. Trial and conviction before the Supreme Court without a jury carried a mandatory death penalty whilst trial and conviction in the Intermediate Court would result in a term of imprisonment and a fine. Hence by use of such a discretionary power the Director of Public Prosecution was able to determine the sentence to be imposed on the individual concerned. The Privy Council was therefore correct to conclude that since the provision removed from the Court its judicial prerogative of sentencing by placing it in the hands of the executive, such provision amounted to a violation of the independence of the judiciary and an aberration of the principle of the

separation of powers.

It is therefore evident that the cases of *Khoryatty* and *Ali* do not in effect support the contention of the petitioner on the issues of separation of powers and independence of the judiciary. As quoted from the case of *Hinds v Queen* [1977] AC 195 by this Court in the case of *Aaron Simeon v Attorney- General* (2010) SLR 280 -

> There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of the general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. The Legislature does not prescribe the penalty to be imposed in an individual citizen's case, it states the general rule, and application of that rule is for the courts.

It is therefore concluded that the answer to the first issue of whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code requiring the imposition of a mandatory minimum sentence contravene article 1 and article 119(2) of the Constitution is negative. The principle of separation of powers and the independence of the judiciary can be said to have been qualified as indeed it was qualified *ab initio* by article 119(2) of the Constitution but certainly not violated.

The second issue is whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code. Article 16 of the Constitution of Seychelles states as follows:

> Every person has the right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment.

This article embodies the spirit of articles 1 and 5 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris. While the UDHR is not a treaty itself, the Declaration was explicitly adopted for the purpose of defining the meaning of the various terms appearing in the United Nations Charter, which is binding on all member states and which Seychelles became a member state on 21 September 1976. The above-mentioned articles read as follows:

> Article 1
>
> > All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Article 5
>
> > No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

It is worthwhile to begin by first considering the elements and meaning of the notion

"dignity worthy of a human being" - and what would amount to torture, cruel, inhuman or degrading treatment.

The dictionary defines dignity as the quality of being worthy of self-respect, self-regard and self-worth.

Dignity in humans involves the earning or the expectation of personal respect or of esteem. Human dignity is something that is inherently a person's God-given inalienable right that deserves to be protected and promoted by the Government and the community. Human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. It is even said that dignity is the foundation, the cause and end of all social institutions. Thus all social institutions, governments, states, laws, human rights and respect for persons originate from the concept of dignity of man or his personhood.

In this context any attempt to undermine the dignity of a human being would also undermine the very foundation and support upon which an orderly society is structured.

The 1985 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishmentdefines torture as:

> ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Convention further added the following limitations:

> It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 3 of the European Convention on Human Rights also prohibits torture and inhuman or degrading treatment or punishment. The provision applies, apart from torture as defined by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,to cases of severe police violence and poor conditions in detention.

Article 3 states as follows:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In the case of *Saadi v Italy* (37201/06) ECHR 28 February 2008,the defendant, a terrorism suspect, was facing deportation and alleged torture should he be deported back to Tunisia. The European Court of Human Rights stated thus:

> According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of §3 (of the European Convention on Human Rights). The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
>
> In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in §3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the convention to allow thespecial stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.

Having considered the widely accepted definitions and interpretations of what could amount to treatment with dignity worthy of a human being and what could amount to torture, cruel, inhuman or degrading treatment, the question now is whether the imposition of a minimum mandatory sentence for the offence of breaking and entering into a building and committing a felony therein, contrary to section 291(a) as read with section 27A(1)(c)(i) of the Penal Code of Seychelles in fact violates the petitioner's right to be treated with dignity worthy of a human being and not be subjected to torture, cruel, inhuman or degrading treatment and hence whether the said minimum mandatory sentence contravenesarticle 16 of the Constitution of Seychelles.

Counsel for the petitioner relied on the case of *Phillibert v State of Mauritius* in support of his submission that the imposition of such sentence amounts to a contravention of article 16. Principal State Counsel relied on the cases of *Jeffrey Napoleon v Republic* and *Brian Azemia v Republic* in support of his submission to the contrary.

In the case of *Phillibert v State of Mauritius* the court made the following findings:

> A law which denies an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he may not deserve, would be incompatible with the concept of a fair hearing enshrined in section 10 of our (Mauritian) constitution. A substantial sentence of penal servitude like in the present situation cannot be imposed without giving the accused an adequate opportunity to show why such a sentence should not be mitigated in the light of the detailed facts and circumstances surrounding the commission of the particular

> offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the Accused's degree of criminal culpability.
>
> We hold and declare that section 222(1) of the Criminal Code and section 419(3)of the Dangerous Drugs Act 2000 (as they read prior to the amendment effected by Act No 6 of 2007) contravened section 7(1) of the Constitution in as much as the indiscriminate mandatory imposition of a term of 45 years penal servitude in all cases contravened the principle of proportionality and amounted to "inhuman or degrading punishment" or other such treatment contrary to section 7(1) of the Constitution.
>
> We are however of the view that the impugned section 222(1) of the Criminal Code and section 41(3)of the DDA were unconstitutional only in so far as they provided for a substantial mandatory prison sentence of 45 years and that the relevant sections should be read down in such a way that upon conviction an offender would be liable to a prison sentence in the discretion of the Court but which would carry a maximum of 45years.

The case of *Phillibert* clearly stipulates that a mandatory sentence per se does not amount to cruel, inhuman or degrading treatment. It may only amount to cruel, inhuman or degrading treatment if the length and severity of the sentence is such that it violates the principle of proportionality and removes all discretion from the Court to impose any other term whatsoever. In the present case, the minimum mandatory term of *5* years imprisonment cannot be compared in terms of severity to the fixed term of 45years that was applicable in the *Phillibert* case.

Furthermore, in the present case, the Court retained much discretion to impose any sentence ranging from the minimum mandatory of 5 years to the maximum allowable sentence of 14 years.

In the Canadian case of *Michael Esty Ferquson v Queen* [2008]1 SCR 96, [2008] SCC 6*,* the Court in confirming the principle and importance of proportionality in sentencing as an element to be considered in determining whether a mandatory minimum sentence amounts to cruel, inhuman or degrading treatment had this to say:

> The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate. As the court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable.

In both the cases *Jeffrey Napoleon v Republic* and *Brian Azemia v Republic* the Court followed the similar reasoning as in the *Michael Esty Ferquson* case and in

each case the mandatory sentence prescribed by section 27A(1)(c)(i) of the Penal Code was found not to be grossly disproportionate as to outrage the standards of decency of the Seychellois community and hence did not amount to torture or cruel, inhuman or degrading treatment. Considering that the circumstances of this case are similar to the above-mentioned cases of *Jeffrey Napoleon* and *Brian Azemia*I find no reason to deviate from the principle elucidated in these cases.

In conclusion, the question of whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code must be answered in the negative.

In consequence of the above findings I therefore find;

i. that section 27A(1)(c)(i) and section 291(a) of the Penal Code have not contravened article 1 and article 119(2) of the Constitution and therefore have not affected the interests of the petitioner;

ii. that article 16 of the Constitution has not been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code;

iii. that section 27A(1)(c)(i) and section 291(a) of the Penal Code are consistent with the provisions of article 1, article 119(2) and article 16 of the Constitution and are therefore valid; and

iv. that the sentence of 5 years imprisonment imposed on the petitioner was properly imposed and is valid.

I find that the petitioner's claims are therefore without merit and I would dismiss them accordingly.

I would make no order for costs.

EGONDA-NTENDE CJ: I have had the benefit of reading in draft the judgment of Dodin J. I agree that this petition should fail.

As Burhan J also agreed that this petition should fail, this petition is dismissed. Each party shall bear its costs.

BURHAN J: I had the benefit of reading the draft of the judgment drawn by my brother Dodin J. I concur with the said judgment.

Record: Constitutional Case No 5 of 2010